

DRAFT AIA[®] Document A133[™] – 2009

Standard Form of Agreement Between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price

AGREEMENT made as of the « » day of « » in the year « »
(In words, indicate day, month and year.)

BETWEEN the Owner:
(Name, legal status and address)

«City of Durham» («“Owner” or “City”») »
«General Services Department
101 City Hall Plaza »
Durham, NC 27701

and the Construction Manager:
(Name, legal status and address)

«Lend Lease (US) Construction Inc.» « »
«324 Blackwell Street
Suite 130
Durham, NC 27710»

for the following Project:
(Name and address or location)

«Durham Bulls Athletic Park (“DBAP”) Renovations»
« 409 Blackwell St,
Durham, NC, 27701 »

The Architect:
(Name, legal status and address)

« ROUGHTON NICKELSON DELUCA ARCHITECTS PA»
«3608 University Drive, Suite 204 »
« Durham, NC 27707 »

The Owner’s Designated Representative:
(Name, address and other information)

«The Durham Bulls Baseball Club, Inc. »
«409 Blackwell Street »
« Durham, NC 27701»
« »
« »
« »

The Construction Manager’s Designated Representative:
(Name, address and other information)

« »
« »

ADDITIONS AND DELETIONS:

The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

AIA Document A201[™]-2007, General Conditions of the Contract for Construction, is adopted in this document by reference. Do not use with other general conditions unless this document is modified.

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The Architect's Designated Representative:
(Name, address and other information)

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The Owner and Construction Manager agree as follows.

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ARTICLE 1 GENERAL PROVISIONS

§ 1.1 The Contract Documents

The Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to the execution of this Agreement, other documents listed in this Agreement, and Modifications issued after execution of this Agreement, all of which form the Contract and are as fully a part of the Contract as if attached to this Agreement or repeated herein. Upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal, the Contract Documents will also include the documents described in Section 2.2.3 and identified in the Guaranteed Maximum Price Amendment and revisions prepared by the Architect and furnished by the Owner as described in Section 2.2.8. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. If anything in the other Contract Documents, other than a Modification, is inconsistent with this Agreement, this Agreement shall govern.

§ 1.2 Relationship of the Parties

The Construction Manager understands that the Owner's Designated Representative (also referred to as "the Bulls") intends to be a long term tenant and user of the Durham Bulls Athletic Park ("DBAP"), which is the subject of the Project renovations. Accordingly, as a long term tenant and signatory of the Agreement, the Bulls shall share in the same benefits and rights afforded to the Owner under the terms of this Agreement. The Owner and Bulls have agreed to the Project as part of a development agreement between the Owner and the Bulls, titled, "Agreement for the Redevelopment and Renovation of the Durham Bulls Athletic Park," dated _____ ("Development Agreement"). In accordance with the terms of the Development Agreement, the Owner and the Bulls have agreed to share and assume certain obligations and responsibilities under this Agreement, including the Owner's payment obligations to the Construction Manager. The Construction Manager accepts and acknowledges the division of payment obligations agreed to between the City and the Bulls as further stated in this Agreement and Exhibit A, the Guaranteed Maximum Price Amendment. The Construction Manager further accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate with the Architect and Owner's Designated Representative and exercise the Construction Manager's skill and judgment in furthering

the interests of the Owner; to furnish efficient construction administration, management services and supervision; to furnish at all times an adequate supply of workers and materials; and to perform the Work in an expeditious and economical manner consistent with the Owner's interests. The Owner agrees to furnish or approve, in a timely manner, information required by the Construction Manager and to make payments to the Construction Manager in accordance with the requirements of the Contract Documents.

§ 1.3 General Conditions

For the Preconstruction Phase, AIA Document A201™–2007, General Conditions of the Contract for Construction, shall apply only as specifically provided in this Agreement. For the Construction Phase, the general conditions of the contract shall be as set forth in A201–2007, which document is incorporated herein by reference. The term “Contractor” as used in A201–2007 shall mean the Construction Manager.

ARTICLE 2 CONSTRUCTION MANAGER'S RESPONSIBILITIES

The Construction Manager's Preconstruction Phase responsibilities are set forth in Sections 2.1 and 2.2. The Construction Manager's Construction Phase responsibilities are set forth in Section 2.3. The Owner and Construction Manager may agree, in consultation with the Architect, for the Construction Phase to commence prior to completion of the Preconstruction Phase, in which case, both phases will proceed concurrently. The Construction Manager shall identify a representative authorized to act on behalf of the Construction Manager with respect to the Project.

§ 2.1 Preconstruction Phase

§ 2.1.1 The Construction Manager shall provide a preliminary evaluation of the Owner's program, schedule and construction budget requirements, each in terms of the other.

§ 2.1.2 Consultation

The Construction Manager shall schedule and conduct meetings with the Architect, Owner's Designated Representative and Owner to discuss such matters as procedures, progress, coordination, and scheduling of the Work. The Construction Manager shall advise the Owner and the Architect on proposed site use and improvements, selection of materials, and building systems and equipment. The Construction Manager shall also provide recommendations consistent with the Project requirements to the Owner and Architect on constructability; availability of materials and labor; time requirements for procurement, installation and construction; and factors related to construction cost including, but not limited to, costs of alternative designs or materials, preliminary budgets, life-cycle data, and possible cost reductions.

§ 2.1.3 When Project requirements in Section 3.1.1 have been sufficiently identified, the Construction Manager shall prepare and periodically update a Project schedule for the Architect's review and the Owner's acceptance. The Construction Manager shall obtain the Architect's approval for the portion of the Project schedule relating to the performance of the Architect's services. The Project schedule shall coordinate and integrate the Construction Manager's services, the Architect's services, other Owner consultants' services, and the Owner's responsibilities and identify items that could affect the Project's timely completion. The updated Project schedule shall include the following: submission of the Guaranteed Maximum Price proposal; components of the Work; times of commencement and completion required of each Subcontractor; ordering and delivery of products, including those that must be ordered well in advance of construction; and the occupancy requirements of the Owner.

§ 2.1.4 Phased Construction

The Construction Manager shall provide recommendations with regard to accelerated or fast-track scheduling, procurement, or phased construction. The Construction Manager shall take into consideration cost reductions, cost information, constructability, provisions for temporary facilities and procurement and construction scheduling issues.

§ 2.1.5 Preliminary Cost Estimates

§ 2.1.5.1 Based on the preliminary design and other design criteria prepared by the Architect, the Construction Manager shall prepare preliminary estimates of the Cost of the Work or the cost of program requirements using area, volume or similar conceptual estimating techniques for the Architect's review and Owner's approval. If the Architect or Construction Manager suggests alternative materials and systems, the Construction Manager shall provide cost evaluations of those alternative materials and systems.

§ 2.1.5.2 As the Architect progresses with the preparation of the Schematic Design, Design Development and Construction Documents, the Construction Manager shall prepare and update, at appropriate intervals agreed to by the Owner, Construction Manager and Architect, estimates of the Cost of the Work of increasing detail and refinement and allowing for the further development of the design until such time as the Owner and Construction Manager agree on a Guaranteed Maximum Price for the Work. Such estimates shall be provided for the Architect's review and the Owner's approval. The Construction Manager shall inform the Owner and Architect when estimates of the Cost of the Work exceed the latest approved Project budget and make recommendations for corrective action.

§ 2.1.6 Subcontractors and Suppliers

The Construction Manager shall develop bidders' interest in the Project.

§ 2.1.7 The Construction Manager shall prepare, for the Architect's review and the Owner's acceptance, a procurement schedule for items that must be ordered well in advance of construction. The Construction Manager shall expedite and coordinate the ordering and delivery of materials that must be ordered well in advance of construction. Upon the establishment of the Guaranteed Maximum Price, the Owner shall assign all contracts for these items to the Construction Manager and the Construction Manager shall thereafter accept responsibility for them.

§ 2.1.8 Extent of Responsibility

The Construction Manager shall exercise reasonable care in preparing schedules and estimates. The Construction Manager, however, does not warrant or guarantee estimates and schedules except as may be included as part of the Guaranteed Maximum Price. The Construction Manager is not required to ascertain that the Drawings and Specifications are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, but the Construction Manager shall promptly report to the Architect and Owner any nonconformity discovered by or made known to the Construction Manager as a request for information in such form as the Architect may require.

§ 2.1.9 Notices and Compliance with Laws

The Construction Manager shall comply with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to its performance under this Contract, and with equal employment opportunity programs, and other programs as may be required by governmental and quasi governmental authorities for inclusion in the Contract Documents.

§ 2.1.10 EARLY PROCUREMENT/LONG-LEAD TIME ITEMS/MARKET STRATEGY

§ 2.1.10.1 The Construction Manager shall effect a bid package and pre-bid conference program to develop maximum bidder interest and to fully define the work so as to minimize contingencies for unknowns.

§ 2.1.10.2 The Construction Manager shall recommend to the Owner and the Architect a list and a schedule for the procurement by the Owner of long-lead time items which will be required to meet the schedule for the Project. If the Owner determines, in its own best interest, to procure such long-lead time items, they shall be procured on terms and conditions acceptable to the Construction Manager. Upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Project Price Proposal all contracts for such items shall be assigned by the Owner to the Construction Manager, who shall accept responsibility for such items as if procured by the Construction Manager.

§ 2.1.10.3 If the Owner chooses not to procure long lead time items prior to the bid of the Project, the Architect shall list the items and a delivery schedule in the bid documents and the Construction Manager shall notify the potential Subcontractors of the required schedule that they should take into consideration in their bid. The Construction Manager shall carry out an active program of stimulating interest in the Project by potential qualified Subcontractors.

§ 2.1.10.4 The Construction Manager shall monitor the construction market conditions to identify factors that might affect costs and time for completing the project and report to the Owner and the Architect on the Construction Manager's findings. The Construction Manager shall make a written report and make recommendations on availability of labor, material, equipment, potential bidders, and possible conflicts in the bidding environment and their possible impact.

§ 2.1.10.5 The Construction Manager shall structure an appropriate market strategy to develop and administer

maximum competition for all major elements of the work. As part of this effort, the Construction Manager shall:

- .1 Make recommendations regarding the division of the work in the plans and specification into optimum bidding packages.
- .2 Prior to the end of bidding phase, prepare for the City's review, comment and approval, a list of bidders qualified to perform each item of Work.

§ 2.1.11 SELECTION OF SUBCONTRACTORS

Selection of Subcontractors for the Project shall be conducted as follows:

§ 2.1.11.1 The Construction Manager shall prequalify Subcontractors for all Work. The prequalification criteria shall be determined by the Owner and the Construction Manager to address quality, performance, the time specified for performance of the Project, the cost of construction oversight, time for completion, capacity to perform, and other factors deemed appropriate by the Owner. The Construction Manager shall investigate and develop Subcontractor interest in the Project and shall furnish to the Owner and Architect for their information a list of possible Subcontractors from whom bids will be requested for each principal portion of the Work. The Architect will promptly reply in writing to the Construction Manager if the Architect or Owner knows of any objection to such Subcontractor. The receipt of such list shall not require the Owner or Architect to investigate the qualifications of proposed Subcontractors nor shall it waive the right of the Owner or Architect later to object to or reject any proposed Subcontractor. After the Construction Manager has submitted a list of possible Subcontractors to the Owner and Architect and has received any objection to any Subcontractor, the Construction Manager shall solicit and obtain bids from each non-objectionable Subcontractor to perform each portion of the Work. In addition, the Owner may designate specific persons or entities that the Construction Manager must prequalify prior to bidding.

§ 2.1.11.2 The Construction Manager shall publicly advertise for Subcontractor bids as follows. Bids shall be invited by advertisement in a newspaper having general circulation in the City of Durham or by electronic means, or both. A decision to advertise solely by electronic means, whether for particular parts of the Work or generally for all Work on the Project, shall be approved in advance by the Owner. The advertisements for bidders shall comply with North Carolina General Statutes and Durham City Code. The advertisement shall: (i) state the time and place where plans and specifications of proposed work or a complete description of the apparatus, supplies, materials, or equipment may be had; (ii) state the time and place for opening of the sealed bids; and (iii) reserve to the Owner and Construction Manager the right to reject any or all bids.

§ 2.1.11.3 All bids shall be opened publicly, and once they are opened, shall be public records under Chapter 132 of the North Carolina General Statutes. The Construction Manager shall act as the fiduciary of the Owner in handling and opening bids.

§ 2.1.11.4 The Construction Manager shall award subcontracts for the Work to the lowest responsible, responsive bidder, taking into consideration quality, performance, the time specified in the bids for performance of the Work, the cost of construction oversight, time for completion, compliance with North Carolina General Statute § 143-128.2 (see Section 2.1.12 below), and other factors deemed appropriate by the Owner and advertised as part of the bid solicitation. However, the Owner may require the selection of a different Subcontractor for any portion of the Work. However, in no event shall any subcontract awarded by the Construction Manager be binding on the Construction Manager or the Owner until and unless the Owner accepts the Construction Manager's Guaranteed Maximum Price proposal for the Project and issues a Notice to Proceed.

§ 2.1.11.5 The Construction Manager may perform a portion of the Work only if (i) bidding produces no responsible, responsive bidder for that portion of the Work, the lowest responsible, responsive bidder will not execute a contract for the bid portion of the Work, or the Subcontractor defaults and a prequalified replacement cannot be obtained in a timely manner, and (ii) the Owner, approves of the Construction Manager's performance of that portion of the Work.

§ 2.1.12 EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION

The Construction Manager shall comply with applicable laws, regulations and special requirements of the Contract Documents regarding equal employment opportunity and affirmative action programs, including but not limited to North Carolina General Statute § 143-128.2 and the Ordinance for the Equal Business Opportunity Program in City contracting under Article III of Chapter 18 of the Durham City Code (as the same may be amended from time to time). Prior to soliciting bids for any Subcontractors, the Construction Manager shall submit its plan for compliance with N.C. General Statute § 143-128.2 and the Ordinance for the Equal Business Opportunity Program in City contracting under Article III of Chapter 18 of the Durham City Code for the entire Project for approval by the

Owner. Once the proposed plan is approved by the Owner, the Construction Manager and the Subcontractors shall comply at all times with the approved plan.

§ 2.2 Guaranteed Maximum Price Proposal and Contract Time

§ 2.2.1 At a time to be mutually agreed upon by the Owner and the Construction Manager and in consultation with the Architect, the Construction Manager shall prepare a Guaranteed Maximum Price proposal for the Owner's review and acceptance. The Guaranteed Maximum Price in the proposal shall be the sum of the Construction Manager's estimate of the Cost of the Work, including contingencies described in Section 2.2.4, and the Construction Manager's Fee.

§ 2.2.2 To the extent that the Drawings and Specifications are anticipated to require further development by the Architect, the Construction Manager shall provide in the Guaranteed Maximum Price for such further development consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include such things as changes in scope, systems, kinds and quality of materials, finishes or equipment, all of which, if required, shall be incorporated by Change Order.

§ 2.2.3 The Construction Manager shall include with the Guaranteed Maximum Price proposal a written statement of its basis, which shall include the following:

- .1 A list of the Drawings and Specifications, including all Addenda thereto, and the Conditions of the Contract;
- .2 A list of allowances and a statement of their basis;
- .3 A list of the clarifications and assumptions made by the Construction Manager in the preparation of the Guaranteed Maximum Price proposal, including assumptions under Section 2.2.2, to supplement the information contained in the Drawings and Specifications;
- .4 A statement of the proposed Guaranteed Maximum Price, including a statement of the estimated Cost of the Work organized by trade categories or systems, allowances, contingency, and the Construction Manager's Fee;
- .5 The anticipated date of Substantial Completion upon which the proposed Guaranteed Maximum Price is based, a critical path method schedule for the work and a schedule of the Construction Documents issuance dates for the Project upon which the date of Substantial Compliance is based;
- .6 A date on or before which the Owner can accept the Guaranteed Maximum Price without further written acceptance by the Construction Manager; and,
- .7 Written report verifying compliance with the Equal Business Opportunities Plan.

§ 2.2.4 In preparing the Construction Manager's Guaranteed Maximum Price proposal, the Construction Manager shall limit the following Construction Manager costs to the include its contingency for the Construction Manager's exclusive use to cover those costs considered reimbursable as the Cost of the Work but not included in a Change Order.

§ 2.2.5 The Construction Manager shall meet with the Owner and Architect to review the Guaranteed Maximum Price proposal. In the event that the Owner and Architect discover any inconsistencies or inaccuracies in the information presented, they shall promptly notify the Construction Manager, who shall make appropriate adjustments to the Guaranteed Maximum Price proposal, its basis, or both.

§ 2.2.6 If the Owner notifies the Construction Manager that the Owner has accepted the Guaranteed Maximum Price proposal in writing before the date specified in the Guaranteed Maximum Price proposal, the Guaranteed Maximum Price proposal shall be deemed effective without further acceptance from the Construction Manager. Following acceptance of a Guaranteed Maximum Price, the Owner and Construction Manager shall execute the Guaranteed Maximum Price Amendment amending this Agreement, a copy of which the Owner shall provide to the Architect. The Guaranteed Maximum Price Amendment shall set forth the agreed upon Guaranteed Maximum Price with the information and assumptions upon which it is based.

§ 2.2.7 The Construction Manager shall not incur any cost to be reimbursed as part of the Cost of the Work prior to the commencement of the Construction Phase, unless the Owner provides prior written authorization for such costs.

§ 2.2.8 The Owner shall authorize the Architect to provide the revisions to the Drawings and Specifications to incorporate the agreed-upon assumptions and clarifications contained in the Guaranteed Maximum Price Amendment. The Owner shall promptly furnish those revised Drawings and Specifications to the Construction Manager as they are revised. The Construction Manager shall notify the Owner and Architect of any inconsistencies between the Guaranteed Maximum Price Amendment and the revised Drawings and Specifications.

§ 2.2.9 The Construction Manager shall include in the Guaranteed Maximum Price all sales, consumer, use and similar taxes for the Work provided by the Construction Manager that are legally enacted, whether or not yet effective, at the time the Guaranteed Maximum Price Amendment is executed.

§ 2.3 Construction Phase

§ 2.3.1 General

§ 2.3.1.1 For purposes of Section 8.1.2 of A201–2007, the date of commencement of the Work shall mean the date of commencement of the Construction Phase.

§ 2.3.1.2 The Construction Phase shall commence upon the Owner’s acceptance of the Construction Manager’s Guaranteed Maximum Price proposal or the Owner’s issuance of a Notice to Proceed, whichever occurs earlier.

§ 2.3.2 Administration

§ 2.3.2.1 The Subcontractors whose bids are accepted and used by the Construction Manager to determine the Cost of the Work and to calculate the Guaranteed Maximum Price shall be the Subcontractors used by the Construction Manager unless the Owner authorizes or requires another subcontractor to be used..

§ 2.3.2.2 If the Guaranteed Maximum Price has been established and a qualified bidder has submitted a bid which conforms to the requirements of the Contract Documents without reservations or exceptions, but the Owner thereafter requires that another Subcontractor be used, then the Construction Manager may require that a change in the Work be issued to adjust the Contract Time and the Guaranteed Maximum Price by the difference between the qualified bid of the bidder and the amount of the subcontract or other agreement actually signed with the person or entity designated by the Owner.

§ 2.3.2.3 Subcontracts and agreements with suppliers furnishing materials or equipment fabricated to a special design shall conform to the payment provisions of this Agreement, and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner.

§ 2.3.2.4 The Construction Manager shall schedule and conduct meetings at which Owner, Owner’s Designated Representative, Architect, Construction Manager and appropriate Subcontractors can discuss the status of the Work. The Construction Manager shall prepare and promptly distribute minutes.

§ 2.3.2.5 Promptly after the Owner’s acceptance of the Guaranteed Maximum Price proposal and issuance of a Notice to Proceed on the Project, the Construction Manager shall prepare a schedule for the Work and submittal schedule in accordance with Section 3.10 of A201–2007, including the Owner’s occupancy requirements..

§ 2.3.2.6 The Construction Manager shall provide monthly written reports to the Owner, Owner’s Designated Representative and Architect on the progress of the entire Work. The Construction Manager shall maintain a daily log containing a record of weather, Subcontractors working on the site, number of workers, Work accomplished, problems encountered, and other similar relevant data as the Owner may reasonably require. The log shall be available to the Owner and Architect.

§ 2.3.2.7 The Construction Manager shall develop a system of cost control for the Work, including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The Construction Manager shall identify variances between actual and estimated costs and report the variances to the Owner and Architect and shall provide this information in its monthly reports to the Owner, Owner’s Designated Representative and Architect at regular intervals.

§ 2.4 Professional Services

Section 3.12.10 of A201–2007 shall apply to both the Preconstruction and Construction Phases.

§ 2.5 Hazardous Materials

Section 10.3 of A201–2007 shall apply to both the Preconstruction and Construction Phases.

ARTICLE 3 OWNER'S RESPONSIBILITIES

§ 3.1 Information and Services Required of the Owner

§ 3.1.1 The Owner shall provide full information in a timely manner regarding the requirements of the Project, including a program which shall set forth the Owner's objectives, constraints, and criteria, including schedule, space requirements and relationships, flexibility and expandability requirements, special equipment and systems and site requirements.

§ 3.2 Owner's Designated Representative

The Owner has identified the Owner's Designated Representative authorized to act on behalf of the Owner with respect to the Project. The Owner's Designated Representative shall render decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or Work of the Construction Manager. The Owner's Designated Representative will have the right to visit the Project at such intervals as deemed appropriate by the Owner's Designated Representative. However, no actions taken during such site visit(s) by the Owner's Designated Representative shall relieve the Construction Manager of its obligations as described in the Contract Documents. The Owner's Designated Representative will not have control over, will not be in charge of, and will not be responsible for construction means, methods, techniques, sequences, or procedures, or for safety precautions and programs in connection with the Work, since these are solely the responsibility of the Construction Manager. The Construction Manager shall not rely on oral or other non-written communications from the Owner's Designated Representative. Except as otherwise provided in Section 4.2.1 of A201–2007, the Architect does not have such authority. The term "Owner" means the Owner or the Owner's authorized representative.

§ 3.3 Architect

The Owner shall retain an Architect to provide services, duties and responsibilities as described in the agreement between Owner and Architect, including any additional services requested by the Construction Manager that are necessary for the Preconstruction and Construction Phase services under this Agreement.

ARTICLE 4 COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES

§ 4.1 Compensation

§ 4.1.1 For the Construction Manager's Preconstruction Phase services, the Owner shall compensate the Construction Manager as follows:

§ 4.1.2 For the Construction Manager's Preconstruction Phase services described in Sections 2.1 and 2.2:
(Insert amount of, or basis for, compensation and include a list of reimbursable cost items, as applicable.)

«\$50,000.00»

§ 4.1.3 If the Preconstruction Phase services covered by this Agreement have not been completed within «Eight» («8 ») months of the date of this Agreement, through no fault of the Construction Manager, the Construction Manager's compensation for Preconstruction Phase services shall be equitably adjusted.

§ 4.1.4 Compensation based on Direct Personnel Expense includes the direct salaries of the Construction Manager's personnel providing Preconstruction Phase services on the Project and the Construction Manager's costs for the mandatory and customary contributions and benefits related thereto, such as employment taxes and other statutory employee benefits, insurance, sick leave, holidays, vacations, employee retirement plans and similar contributions.

§ 4.2 Payments

§ 4.2.1 Payments shall be made monthly Following Payments are due and payable « Thirty » («30 ») days from the date the Construction Manager's Invoice is received by the Owner. Amounts unpaid after the date on which payment is due shall bear simple interest at the rate entered below, or in the absence thereof at the legal rate prevailing from time to time at the place where the Project is located.

(Insert rate of monthly or annual interest agreed upon.)

«8» % «per annum»

(Usury laws and requirements under the Federal Truth in Lending Act, similar state and local consumer credit laws and other regulations at the Owner's and Contractor's principal places of business, the location of the Project and elsewhere may affect the validity of this provision. Legal advice should be obtained with respect to deletions or modifications, and also regarding requirements such as written disclosures or waivers.)

ARTICLE 5 COMPENSATION FOR CONSTRUCTION PHASE SERVICES

§ 5.1 For the Construction Manager's performance of the Work as described in Section 2.3, the City shall pay the Construction Manager the City's Contract Sum portion as defined in the Guaranteed Maximum Price Amendment (hereinafter, "City Contract Sum Portion") and the Bulls shall pay the Construction Manager the remaining Contract Sum that exceeds the City Contract Sum Portion, all in current funds. The Contract Sum is the Cost of the Work as defined in Section 6.1.1 plus the Construction Manager's Fee.

§ 5.1.1 The Construction Manager's Fee:

(State a lump sum, percentage of Cost of the Work or other provision for determining the Construction Manager's Fee.)

2.40% the Cost of the Work as defined in Section 6.1.1; »

§ 5.1.2 The method of adjustment of the Construction Manager's Fee for changes in the Work:

«Take 2.40% to the amount of the increase or decrease in the Cost of the Work and add it to the initial CM Fee (if an increase) or subtract it from the initial CM Fee (if a decrease)»

§ 5.1.3 Limitations, if any, on a Subcontractor's overhead and profit for increases in the cost of its portion of the Work:

«shall be reasonable and customary according to the place of the Project subject to prior approval of the Owner »

§ 5.1.4 Rental rates for Construction Manager-owned equipment shall not be consistent with the standard rate paid at the place of the Project.

§ 5.1.5 Unit prices, if any:

(Identify and state the unit price; state the quantity limitations, if any, to which the unit price will be applicable.)

Item	Units and Limitations	Price per Unit (\$0.00)
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§ 5.2 Guaranteed Maximum Price

§ 5.2.1 The Construction Manager guarantees that the Contract Sum shall not exceed the Guaranteed Maximum Price set forth in the Guaranteed Maximum Price Amendment, as it is amended from time to time. To the extent the Cost of the Work exceeds the Guaranteed Maximum Price, the Construction Manager shall bear such costs in excess of the Guaranteed Maximum Price without reimbursement or additional compensation from the Owner.

(Insert specific provisions if the Construction Manager is to participate in any savings.)

«N/A»

§ 5.2.2 The Guaranteed Maximum Price is subject to additions and deductions by Change Order as provided in the Contract Documents and the Date of Substantial Completion shall be subject to adjustment as provided in the Contract Documents.

§ 5.3 Changes in the Work

§ 5.3.1 Adjustments to the Guaranteed Maximum Price on account of changes in the Work subsequent to the execution of the Guaranteed Maximum Price Amendment may be determined by any of the methods listed in Section 7.3.3 of AIA Document A201-2007, General Conditions of the Contract for Construction.

§ 5.3.2 In calculating adjustments to subcontracts the adjustments shall be made in accordance with the terms of those subcontracts subject to contained in Article 7 of the AIA Document A201–2007.

§ 5.3.3 In calculating adjustments to the Guaranteed Maximum Price, the terms “cost” and “costs” as used in the above-referenced provisions of AIA Document A201–2007 shall mean the Cost of the Work as defined in Article 6 of this Agreement and the term “fee” shall mean the Construction Manager’s Fee as defined in Section 5.1 of this Agreement.

§ 5.3.5 If no specific provision is made in Section 5.1.2 for adjustment of the Construction Manager’s Fee in the case of changes in the Work, or if the extent of such changes is such, in the aggregate, that application of the adjustment provisions of Section 5.1.2 will cause substantial inequity to the Owner or Construction Manager, the Construction Manager’s Fee shall be equitably adjusted on the same basis that was used to establish the Fee for the original Work, and the Guaranteed Maximum Price shall be adjusted accordingly.

ARTICLE 6 COST OF THE WORK FOR CONSTRUCTION PHASE

§ 6.1 Costs to Be Reimbursed

§ 6.1.1 The term Cost of the Work shall mean the items set forth in this Section 6.1. Such costs shall be at rates not higher than those customarily paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in Sections 6.1 through 6.7 and are subject to review and verification by the owner or Architect at the Owner’s discretion, prior to reimbursement by Owner to Construction Manager.

§ 6.1.2 Where any cost is subject to the Owner’s prior approval, the Construction Manager shall obtain this approval prior to incurring the cost. The parties shall endeavor to identify any such costs prior to executing Guaranteed Maximum Price Amendment.

§ 6.2 Labor Costs

§ 6.2.1 Wages of construction workers directly employed by the Construction Manager to perform the construction of the Work at the site or, with the Owner’s prior approval, at off-site workshops.

§ 6.2.2 Wages or salaries of the Construction Manager’s supervisory and administrative personnel who provide services directly related to the Project: Officer-in-Charge, Project Executive, Project Manager, Assistant Project Manager(s), Estimator(s), Scheduler(s), General Superintendent(s), Project Superintendent(s), Assistant Superintendent(s), Site Safety personnel, Technical Support personnel, Mechanical/Electrical Project Manager(s) and Superintendent(s), Project Accountant(s), timekeepers, personnel referred to in Section 6.2.3, EEO personnel, insurance personnel, clerical and data processing personnel, and such other classes of personnel as are approved by the Owner. For any such personnel who devotes time to the Project during the payroll pay period, Owner will pay to Construction Manager an amount equal to the product of the following: (1) the bi-weekly salary paid to such personnel divided by the total number of hours that such personnel charged (whether to this Project, other projects, or otherwise) for the payroll period; and (2) the number of hours worked on this Project. Any increase in such staffing shall be approved by the Owner if it would increase the Guaranteed Maximum Price..

(If it is intended that the wages or salaries of certain personnel stationed at the Construction Manager’s principal or other offices shall be included in the Cost of the Work, identify in Section 11.5, the personnel to be included, whether for all or only part of their time, and the rates at which their time will be charged to the Work.)

§ 6.2.3 Wages and salaries of the Construction Manager’s supervisory or administrative personnel engaged at factories, workshops or on the road, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the Work.

§ 6.2.4 Costs paid or incurred by the Construction Manager for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided such costs are based on wages and salaries included in the Cost of the Work under Sections 6.2.1 through 6.2.3.

§ 6.2.5 Bonuses, profit sharing, incentive compensation and any other discretionary payments paid to anyone hired by the Construction Manager or paid to any Subcontractor or vendor, with the Owner’s prior approval.

§ 6.3 Subcontract Costs

Payments made by the Construction Manager to Subcontractors in accordance with the requirements of the subcontracts.

§ 6.4 Costs of Materials and Equipment Incorporated in the Completed Construction

§ 6.4.1 Costs, including transportation and storage, of materials and equipment incorporated or to be incorporated in the completed construction.

§ 6.4.2 Costs of materials described in the preceding Section 6.4.1 in excess of those actually installed to allow for reasonable waste and spoilage. Unused excess materials, if any, shall become the Owner's property at the completion of the Work or, at the Owner's option, shall be sold by the Construction Manager. Any amounts realized from such sales shall be credited to the Owner as a deduction from the Cost of the Work.

§ 6.5 Costs of Other Materials and Equipment, Temporary Facilities and Related Items

§ 6.5.1 Costs of transportation, storage, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment and hand tools not customarily owned by construction workers that are provided by the Construction Manager at the site and fully consumed in the performance of the Work. Costs of materials, supplies, temporary facilities, machinery, equipment and tools that are not fully consumed shall be based on the cost or value of the item at the time it is first used on the Project site less the value of the item when it is no longer used at the Project site. Costs for items not fully consumed by the Construction Manager shall mean fair market value.

§ 6.5.2 Rental and/or leasing of vehicles and automobiles, and rental charges for temporary facilities, machinery, equipment and hand tools not customarily owned by construction workers that are provided by the Construction Manager at the site and costs of transportation, installation, minor repairs, dismantling and removal thereof, storage, insurance, taxes, deposits, unloading and return to point of origin. The total rental cost of any Construction Manager-owned item may not exceed the purchase price of any comparable item. Rates of Construction Manager-owned equipment and quantities of equipment shall be subject to the Owner's prior approval.

§ 6.5.3 Costs of removal of waste and debris from the site of the Work and its proper and legal disposal.

§ 6.5.4 Costs of document reproductions, photographs, messengers, facsimile transmissions and long-distance telephone calls, postage and parcel express delivery charges, telephone service at the site, mobile phone and wireless mail-enabled device charges (including third-party management fees), reasonable petty cash expenses of the site office, Project specific training, Project specific hardware and software charges, Project specific charges for heat, light, power, water, sanitary facilities, first aid facilities, safety protection, safety personnel and advisors, weather protection, elevator services and hoisting and all items ancillary to foregoing.

§ 6.5.5 That portion of the reasonable expenses of the Construction Manager's supervisory or administrative personnel incurred while traveling in discharge of duties connected with the Work.

§ 6.5.6 Costs of materials and equipment suitably stored off the site at a mutually acceptable location, subject to the Owner's prior approval.

§ 6.6 Miscellaneous Costs

§ 6.6.1 That portion of insurance including premiums, reasonable reserves for losses and other directly related insurance expenses and bonds required by the Contract Documents that can be attributed to this Contract, but not to exceed the following percentages of the Cost of the Work: (a) 1.15% for Contractors Insurance & Builders Risk, (b) 0.75% for Payment and Performance Bonds, and (c) 0.30% for Building Permit Allowance. Self-insurance for either full or partial amounts of the coverages required by the Contract Documents, with the Owner's prior approval.

§ 6.6.2 Sales, use or similar taxes imposed by a governmental authority that are related to the Work and for which the Construction Manager is liable.

§ 6.6.3 Fees and assessments for the building permit and for other permits, licenses and inspections for which the Construction Manager is required by the Contract Documents to pay.

§ 6.6.4 Fees of laboratories for tests required by the Contract Documents, except those related to defective or nonconforming Work for which reimbursement is excluded by Section 13.5.3 of AIA Document A201–2007 or by other provisions of the Contract Documents, and which do not fall within the scope of Section 6.7.3.

§ 6.6.5 Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents; the cost of defending suits or claims for infringement of patent rights arising from such requirement of the Contract Documents; and payments made in accordance with legal judgments against the Construction Manager resulting from such suits or claims and payments of settlements made with the Owner's consent. However, such costs of legal defenses, judgments and settlements shall not be included in the calculation of the Construction Manager's Fee or subject to the Guaranteed Maximum Price. If such royalties, fees and costs are excluded by the last sentence of Section 3.17 of AIA Document A201–2007 or other provisions of the Contract Documents, then they shall not be included in the Cost of the Work.

§ 6.6.6 Costs for electronic equipment and software, directly related to the Work with the Owner's prior approval.

§ 6.6.7 Deposits lost for causes other than the Construction Manager's negligence or failure to fulfill a specific responsibility in the Contract Documents.

§ 6.6.8 Subject to the Owner's prior approval, expenses incurred in accordance with the Construction Manager's standard written personnel policy for relocation and temporary living allowances of the Construction Manager's personnel required for the Work.

§ 6.7 Other Costs and Emergencies

§ 6.7.1 Other costs incurred in the performance of the Work if, and to the extent, approved in advance in writing by the Owner.

§ 6.7.2 Costs incurred in taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property, as provided in Section 10.4 of AIA Document A201–2007.

§ 6.7.3 Costs of repairing or correcting damaged or nonconforming Work executed by the Construction Manager, Subcontractors or suppliers, provided that such damaged or nonconforming Work was not caused by negligence or failure to fulfill a specific responsibility of the Construction Manager and only to the extent that the cost of repair or correction is not recovered by the Construction Manager from insurance, sureties, Subcontractors, suppliers, or others.

§ 6.7.4 The costs described in Sections 6.1 through 6.7 shall be included in the Cost of the Work, notwithstanding any provision of AIA Document A201–2007 or other Conditions of the Contract which may require the Construction Manager to pay such costs, unless such costs are excluded by the provisions of Section 6.8.

§ 6.8 Costs Not To Be Reimbursed

§ 6.8.1 The Cost of the Work shall not include the items listed below:

- .1 Salaries and other compensation of the Construction Manager's personnel stationed at the Construction Manager's principal office or offices other than the site office, except as specifically provided in Section 6.2, or as may be provided in Article 11;
- .2 Expenses of the Construction Manager's principal office and offices other than the site office;
- .3 Overhead and general expenses, except as may be expressly included in Sections 6.1 to 6.7;
- .4 The Construction Manager's capital expenses, including interest on the Construction Manager's capital employed for the Work;
- .5 Except as provided in Section 6.7.3 of this Agreement, costs due to the negligence or failure of the Construction Manager, Subcontractors and suppliers or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable to fulfill a specific responsibility of the Contract;
- .6 Any cost not specifically and expressly described in Sections 6.1 to 6.7;
- .7 Costs, other than costs included in Change Orders approved by the Owner, that would cause the Guaranteed Maximum Price to be exceeded; and
- .8 Costs for services incurred during the Preconstruction Phase.

§ 6.9 Discounts, Rebates and Refunds

§ 6.9.1 Cash discounts obtained on payments made by the Construction Manager shall accrue to the Owner if (1) before making the payment, the Construction Manager included them in an Application for Payment and received payment from the Owner, or (2) the Owner has deposited funds with the Construction Manager with which to make payments; otherwise, cash discounts shall accrue to the Construction Manager. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to the Owner, and the Construction Manager shall make provisions so that they can be obtained.

§ 6.9.2 Amounts that accrue to the Owner in accordance with the provisions of Section 6.9.1 shall be credited to the Owner as a deduction from the Cost of the Work.

§ 6.11 Accounting Records

The Construction Manager shall keep full and detailed records and accounts related to the cost of the Work and exercise such controls as may be necessary for proper financial management under this Contract and to substantiate all costs incurred. The accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner's accountants shall, during regular business hours and upon reasonable notice, be afforded access to, and shall be permitted to audit and copy, the Construction Manager's records and accounts related to the cost of the Work, including complete documentation supporting accounting entries, books, correspondence, instructions, drawings, receipts, subcontracts, Subcontractor's proposals, purchase orders, vouchers, memoranda and other data relating to this Contract. The Construction Manager shall preserve these records for a period of three years after final payment, or for such longer period as may be required by law.

§ 6.12 Reconciliation of Costs and Expenses

Certain amounts requisitioned for, including, without limitation, certain miscellaneous General Conditions items and Subcontractor percentages of completion, are based upon good faith estimates using information available at the time that the monthly Application for Payment is submitted. All such estimates will be reconciled in subsequent Applications for Payment, and in no event later than the time of submittal of the Final Application for Payment as agreed upon by Owner and Construction Manager.

ARTICLE 7 PAYMENTS FOR CONSTRUCTION PHASE SERVICES

§ 7.1 Progress Payments

§ 7.1.1 Based upon Applications for Payment submitted to the Architect by the Construction Manager and Certificates for Payment issued by the Architect, the Owner shall make progress payments on account of the Contract Sum to the Construction Manager as provided below and elsewhere in the Contract Documents.

§ 7.1.2 The period covered by each Application for Payment shall be one calendar month ending on the last day of the month, or as follows:

«N/A»

§ 7.1.3 Provided that an Application for Payment is received by the Architect not later than the « 1st » day of a month, the Owner shall make payment to the Construction Manager not later than the « 25th » day of the «same» month. If an Application for Payment is received by the Architect after the application date fixed above, payment shall be made by the Owner not later than «Thirty» («30») days after the Architect receives the Application for Payment.

(Federal, state or local laws may require payment within a certain period of time.)

§ 7.1.4 With each Application for Payment, the Construction Manager shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, and any other evidence required by the Owner or Architect to demonstrate that cash disbursements already made by the Construction Manager on account of the Cost of the Work equal or exceed progress payments already received by the Construction Manager, less that portion of those payments attributable to the Construction Manager's Fee, plus payrolls for CM's personnel for the period covered by the present Application for Payment.

§ 7.1.5 Each Application for Payment shall be based on the most recent schedule of values submitted by the Construction Manager in accordance with the Contract Documents. The schedule of values shall allocate the entire Guaranteed Maximum Price among the various portions of the Work, except that the Construction Manager's Fee

shall be shown as a single separate item. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Construction Manager's Applications for Payment.

§ 7.1.6 Applications for Payment shall show the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage of completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed, or (2) the percentage obtained by dividing (a) the expense that has actually been incurred by the Construction Manager on account of that portion of the Work for which the Construction Manager has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values.

§ 7.1.7 Each application for payment shall be based upon the schedule of values submitted by the Contractor in accordance with the Contract Documents. The schedule of values shall allocate the entire guaranteed maximum price among the various portions of the Work, except that the Contractor's fee shall be shown as a separate item. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's applications for payment.

- .1 Applications for payment shall show the percentage completion of each portion of the Work as of the end of the period covered by the application for payment. The percentage completion shall be the percentage of that portion of the Work which has actually been completed.
 - .2 Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows: .1 Take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage of completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values;
 - .2 Add that portion of the Guaranteed Maximum Price properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work, or if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing;
 - .3 Add the Construction Manager's Fee : the Contractor Manager's portion of the fee for construction phase services shall be an amount which bears the same ratio to the total fee as the total payment described in the two preceding clauses bears to the cost of the Work defined in the Contract Documents;
 - .4 Subtract retainage as provide in Paragraph 7.1.7.3 ;
 - .5 Subtract the aggregate of previous payments made by the Owner;
 - .6 Subtract the amount, if any, by the Construction Manager in the has been previously overpaid as evidenced by the Owner's accountant review of the Construction Manager's documentation or by any audit of Construction Manager's records; and
 - .7 Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Section 9.5 of AIA Document A201-2007.
- .3 Retainage shall be calculated as five percent of the costs and fees calculated pursuant to Paragraphs 7.1.7.2.1, 7.1.7.2.2, and 7.1.7.2.3. Retainage shall be held by the Owner until satisfactory final completion and close out of the Project. Satisfactory completion and close out of the Project means that the Owner and the Architect are satisfied that the Project has been completed in accordance with the plans and specifications and within the guaranteed maximum price, all General Conditions pertaining to close out have been satisfied, and all Subcontractors have satisfactorily completed their Work.
 - .4 Except with the Owner's prior approval, the Construction Manager shall not make advance payments to suppliers for materials or equipment, which have not been delivered and stored at the site.
 - .5 If after the project is deemed fifty percent (50%) complete based upon the Construction Manager's gross project invoices, excluding the value of materials stored off-site, except that the value of the materials stored on-site shall not exceed 20% of the Construction Manager's gross project invoices for the purpose of determining the percent completion of the Project, and the Construction Manager provides Owner and the Architect the following:
 - .1 Written verification evidencing 50% completion of the Project; and,

- .2 Written consent of the surety named in the project performance and payment bonds agreeing that the Owner shall not retain any further retainage from periodic payments due to the Construction Manager;
- the Owner shall cease holding retainage from future periodic payments if the Owner finds that the Construction Manager is performing satisfactorily, and any nonconforming work identified in writing by the Architect or owner (prior to the point of 50% project completion) has been corrected by the Construction Manager and accepted by the Architect or Owner, whoever provided such prior notice of nonconforming work. If, however, the Owner determines the Construction Manager's performance is unsatisfactory, the Owner may reinstate the specified retainage for each subsequent periodic payment. Notwithstanding anything to the contrary, Owner may assess retainage after 50% project completion, even if the Construction Manager has complied with Paragraphs 7.1.7.5.1 and 7.1.7.5.2 and continues to perform satisfactorily as necessary to retain two and one-half percentage (2.5%) total retainage through the completion of the Project.
- .6 If by or before the Project is deemed 50% complete and one hundred percent (100%) performance has been completed for the following "early" finishing trades: (1) structural steel; (2) piling; (3) caisson; or (4) demolition; and after receipt by the Owner of an approval or certificate from the Architect that such early finishing work is acceptable and in accordance with the Contract Documents, and after the Construction Manager provides Owner and the Architect the following:
- .1 The early finishing trade subcontractor's written request for such payment; and,
- .2 Written consent of the surety named in the project performance and payment bonds agreeing that the Owner shall make such early finishing trade payment;
- the Owner shall make full payment to the Construction Manager for said 100% completed early finishing trade work less retainage of five-tenths percent (0.5%)(of the early finishing trade contract) upon the later occurrence of (1) 60 days receipt of said early finishing trade subcontractor's written request, or (2) immediately upon receipt of said written consent of the surety.
- .7 Within 60 days of receipt by owner of (1) a pay request and (2) written consent of the surety, and after Owner has either (1) received a certificate of substantial completion, or (2) received beneficial occupancy or use of the project (if applicable), the Owner shall pay an amount sufficient to increase total payment to Construction Manager to the Contract Price, less such amounts as the Architect shall determine in accordance with the Final Payment provisions of Section 7.2, including up to 250% of the Architect's estimate of Work to be completed or corrected as shown on the tentative list of items to be completed or corrected attached to the certificate of Substantial Completion.
- .8 Notwithstanding any of the retainage provisions described herein, there shall be no retainage on periodic or final payments for contracts having a total project cost less than \$100,000.00, and, in addition to any retainage amounts allowed to be held by the Owner, the Owner shall also retain all rights allowed under this Agreement to withhold payment to the Construction Manager for unsatisfactory job progress, defective or nonconforming construction not remedied, disputed work, or third-party claims filed against the Owner or reasonable evidence that a third-party claim will be filed.

§ 7.1.8 Except with the Owner's prior approval, payments to Subcontractors shall be subject to retention consistent with the percentage of retainage on payments made by the owner to the Construction Manager. The Owner and the Construction Manager shall agree upon a mutually acceptable procedure for review and approval of payments and retention for subcontracts.

§ 7.1.9 Except with the Owner's prior approval, the Construction Manager shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

§ 7.1.10 In taking action on the Construction Manager's Applications for Payment, the Architect shall be entitled to rely on the accuracy and completeness of the information furnished by the Construction Manager and shall not be deemed to represent that the Architect has made a detailed examination, audit or arithmetic verification of the documentation submitted in accordance with Section 7.1.4 or other supporting data; that the Architect has made exhaustive or continuous on-site inspections; or that the Architect has made examinations to ascertain how or for what purposes the Construction Manager has used amounts previously paid on account of the Contract. Such examinations, audits and verifications, if required by the Owner, will be performed by the Owner's accountants acting in the sole interest of the Owner.

§ 7.1.11 The Owner may agree to reduce the amount of retainage withheld from the Construction Manager's Applications for Payment in accordance with a written application by the Construction Manager to allow it to reduce the retention the Construction Manager is withholding from payments to Subcontractors that have achieved final completion of the entire scope of the Subcontractor's work. Any amounts by which the Owner reduces retainage for this purpose are to be used by the Construction Manager for the sole purpose of making payments to the specific Subcontractor(s) identified in the application. Any such application by the Construction Manager shall include all final documents required of each Subcontractor to be paid.

§ 7.2 Final Payment

§ 7.2.1 Final payment shall be made by the Owner to the Construction Manager when

- .1 the Construction Manager has fully performed the Contract except for the Construction Manager's responsibility to correct Work as provided in Section 12.2.2 of AIA Document A201-2007, and to satisfy other requirements, if any, which extend beyond final payment;
- .2 the Construction Manager has submitted a final accounting for the Cost of the Work and a final Application for Payment; and
- .3 a final Certificate for Payment has been issued by the Architect.

The Owner's final payment to the Construction Manager shall be made no later than 30 days after the issuance of the Architect's final Certificate for Payment, or as follows:

- «.4 Take the sum of the Project's Cost of the Work substantiated by the Construction Manager's final accounting and the Construction Manager's Fee for the Project, but not more than the Guaranteed Maximum Project Price.
- .5 Subtract amounts, if any, for which the Architect withholds, in whole or in part, a final Certificate for Payment as provided in Section 9.5.1 of the General Conditions or other provisions of the Contract Documents.
- .6 Subtract the aggregate of previous payments made by the Owner.
- .7 The Parties agree that, in order to make a final determination of Cost of the Work to be reflected in the final Application for Payment and the Final Payment, the Parties shall meet to reconcile ("Reconciliation") all estimated costs and reimbursable expenses of the Project. The Parties agree that once the Reconciliation has been agreed by the Parties, all such costs and reimbursable expenses shall be deemed final.

If the aggregate of previous payments made by the Owner exceeds the amount due the Construction Manager, the Construction Manager shall reimburse the difference to the Owner.

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§ 7.2.2 The Owner's accountants will review and report in writing on the Construction Manager's final accounting within 30 days after delivery of the final accounting to the Architect by the Construction Manager. Based upon such Cost of the Work as the Owner's accountants report to be substantiated by the Construction Manager's final accounting, and provided the other conditions of Section 7.2.1 have been met, the Architect will, within seven days after receipt of the written report of the Owner's accountants, either issue to the Owner a final Certificate for Payment with a copy to the Construction Manager, or notify the Construction Manager and Owner in writing of the Architect's reasons for withholding a certificate as provided in Section 9.5.1 of the AIA Document A201-2007. The time periods stated in this Section supersede those stated in Section 9.4.1 of the AIA Document A201-2007.

§ 7.2.3 If the Owner's accountants report the Cost of the Work as substantiated by the Construction Manager's final accounting to be less than claimed by the Construction Manager, the Construction Manager shall be entitled to proceed in accordance with Article 9 without seeking a further decision of the Architect. Unless agreed to otherwise, a demand for mediation of the disputed amount shall be made by the Construction Manager within 30 days after the Construction Manager's receipt of a copy of the Architect's final Certificate for Payment. Failure to make such demand within this 30-day period shall result in the substantiated amount reported by the Owner's accountants becoming binding on the Construction Manager. Pending a final resolution of the disputed amount, the Owner shall pay the Construction Manager the amount certified in the Architect's final Certificate for Payment.

§ 7.2.4 If, subsequent to final payment and at the Owner's request, the Construction Manager incurs costs described in Section 6.1.1 and not excluded by Section 6.8 to correct defective or nonconforming Work, the Owner shall

reimburse the Construction Manager such costs and the Construction Manager's Fee applicable thereto on the same basis as if such costs had been incurred prior to final payment, but not in excess of the Guaranteed Maximum Price. If the Construction Manager has participated in savings as provided in Section 5.2.1, the amount of such savings shall be recalculated and appropriate credit given to the Owner in determining the net amount to be paid by the Owner to the Construction Manager.

§ 7.3 OWNERS' RIGHT TO AUDIT

The Owner's accountants may review the Construction Manager's final accounting. The Construction Manager shall maintain all records relating to the Project and this contract including, but not limited to, records of costs and shall make all records available to the Owner's accountants upon request.

ARTICLE 8 INSURANCE AND BONDS

For all phases of the Project, the Construction Manager covenants and agrees that, prior to the commencement of any Work, the Construction Manager shall obtain the following insurance from companies authorized to do business in the State of North Carolina having a Best rating of A- or better and which shall, unless otherwise expressly set forth herein, be maintained by Construction Manager at all times during construction on or about the Project site until Completion of the Work (including any warranty or corrective work pursuant to the Contract Documents):

- .1 Commercial General Liability insurance with aggregate limits not less than **Ten Million Dollars (\$10,000,000)** for bodily injury and for property damage covering the Project site and all streets, alleys, and sidewalks adjoining or appurtenant to the Project site on which construction activities relating to the Project occur, and such insurance shall provide premises-operations liability, products and completed operations, broad form contractual liability, independent contractors, XCU (explosion, collapse, underground damage), elevator liability, broad form property damage, personal injury and advertising liability; liability coverage limits may be reached by any combination of primary and umbrella/excess insurance;
- .2 Motor Vehicle Liability covering any vehicles (owned, non-owned, hired and leased by Construction Manager and all Subcontractors) with a combined single limit of \$1,000,000 ;
- .3 Workers' Compensation insurance providing statutory North Carolina benefits for all persons employed by (a) Construction Manager and (b) any Contractors and Subcontractors, in connection with any work performed in connection with the Contract Documents, and employer's liability insurance in an amount not less than \$1,000,000. There shall be a waiver of subrogation in favor of the City;
- .4 Builder's risk and installation insurance: inland marine form, all risk coverage including theft and flood & earthquake; insurance shall apply to the work completed as well as all fixtures, furnishing, furniture, equipment, machinery and building materials of any kind whatsoever, both on-site and off-site, while in transit, during loading, unloading, hoisting and testing, written on a replacement cost basis with an annual automatic inflation update, and naming Owner as additional insured as their interests may appear, which insurance shall contain an endorsement stating that "permission is granted to complete and occupy", a waiver of subrogation clause, a "loss clause" providing that full coverage is reinstated after a loss, and if any off-site storage location is used, shall cover for full insurable value, all material and equipment on or about any such off-site storage location intended for use with respect to the Site(s); and have a maximum deductible of **\$100,000** without written approval of the Finance Director of the City of Durham; In addition, Construction Manager shall also require all subcontractors and vendors to provide insurance coverage for materials and equipment which is stored either on-site or off-site, prior to its installation for the purpose of its intended use. Subcontractors and vendors shall be responsible for any builders' risk deductible on any losses incurred to work provided under their Subcontracts.
- .5 Such other insurance as may be reasonably required of a prudent Construction Manager in such amounts as from time to time reasonably may be required by the Owner.

§ 8.2 ADJUSTMENT OF INSURANCE CLAIMS

Construction Manager shall adjust all claims with its insurers. However, Construction Manager shall not adjust any liability claims without the prior written consent of the Owner unless the effect of such adjustment shall be to release the Owner and all Indemnitees from all liability with respect to such claims and liabilities asserted therein. Further,

Construction Manager shall not adjust any property claims without prior written consent of the Owner unless the effect is to make the Owner whole and protect the Owner's financial interest in the proceeds of the claim.

§ 8.3 ADDITIONAL INSURED

All liability insurance required pursuant to this Article 8 (except for employer's liability) shall name the Owner and Owner's Designated Representative as an additional insured as its interests may appear, and an original of the endorsement to effect the coverage must be attached to the certificate (if by blanket endorsement, the agent may so indicate in the GL section in lieu of an original endorsement).

§ 8.4 FAILURE TO OBTAIN AND MAINTAIN INSURANCE

If Construction Manager fails to obtain and maintain the insurance required pursuant to this Article 8 and the General Conditions, or if any insurer cancels or modifies such insurance without consent of the Owner, at the Owner's election (but without any obligation to do so), the Owner may, with written notice to Construction Manager specifying the coverages obtained and the parties insured, procure similar insurance coverage and deduct the entire cost (or part thereof) from the amounts payable by the Owner to Construction Manager pursuant to Article 7. The Construction Manager has an affirmative obligation to provide notice to the Owner of any modification or cancellation of policies required by this contract. Construction Manager shall not perform Work during any period when any policy of insurance required hereunder is not in effect.

§ 8.5 PERFORMANCE BOND AND PAYMENT BOND

§ 8.5.1 The Construction Manager shall furnish bonds covering faithful performance of the Project and payment of obligations arising thereunder. Bonds may be obtained through the Construction Manager's usual source, and the cost thereof shall be included in the Cost of the Work for the Project. The amount of the bond shall at all times be equal to or greater than **One Hundred Percent (100%)** of the Guaranteed Maximum Price.

ARTICLE 9 DISPUTE RESOLUTION

§ 9.1 During both the Preconstruction and Construction Phases, Claims, disputes or other matters in question between the parties to this Agreement shall be resolved as provided in Sections 15.3 of the General Conditions except that, during the Preconstruction Phase, no decision by the Architect shall be a condition precedent to mediation.

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ARTICLE 10 TERMINATION OR SUSPENSION

§ 10.1 TERMINATION FOR CONVENIENCE

Owner may for any reason whatsoever terminate or suspend performance of the Preconstruction Services, the Work, this Agreement, or any part of any of them, for Owner's convenience pursuant to Article 14 of the General Conditions. Owner shall give written notice of such termination to Construction Manager specifying when termination becomes effective and the scope thereof.

§ 10.2 CEASING PERFORMANCE UPON TERMINATION

§ 10.2.1 From and after the effective date of any termination, Construction Manager shall not incur, nor permit any Subcontractor to incur, any further expense or obligations in connection with the terminated portion of the Work or Preconstruction Services. From and after the effective date of any termination, Construction Manager shall cease performance and cause the Subcontractors to cease performance, to the extent of the terminated portion of the Work or Preconstruction Services. In the event of termination of this Agreement, Construction Manager shall terminate outstanding Subcontracts and purchase orders related to the terminated portion of the Work or Preconstruction Services unless directed to do otherwise by Owner. Unless directed otherwise by Owner, Construction Manager shall settle the liabilities and claims arising out of the termination of the Subcontracts. If requested by Owner, Construction Manager shall vacate the Project site immediately.

§ 10.2.2 Owner may direct Construction Manager to assign, and Construction Manager hereby agrees to assign, Construction Manager's right, title and interest under open or terminated subcontracts or purchase orders to Owner or its designee. To the extent that the Owner elects to take assignment of subcontracts and purchase orders

(including rental agreements), the Construction Manager shall, as a condition of receiving the payments referred to in this Article 10, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Construction Manager, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Construction Manager under such subcontracts or purchase orders. Subcontracts, purchase orders and rental agreements entered into by the Construction Manager for the Project shall contain provisions permitting assignment to the Owner as described above.

§ 10.3 SUBMISSION OF TERMINATION CLAIM

In the event of termination of all or any part of the Preconstruction Services, the Work or this Agreement for convenience, Construction Manager shall, within thirty (30) days after the effective date of termination, submit a written termination claim to Owner specifying the amounts due because of the termination together with costs, pricing, and other supporting documentation or data required by Owner. Construction Manager's failure to file a termination claim within such thirty (30) day period shall constitute a waiver of any claim to compensation relating to the termination. If a proper termination claim is submitted, then Owner shall pay Construction Manager an amount derived in accordance with Section 14.4 of the General Conditions.

§ 10.4 TERMINATION FOR CAUSE

If Construction Manager refuses or fails to perform its Preconstruction Services or other duties under this Agreement in a timely manner, supply enough properly skilled supervisory personnel, labor or proper equipment or materials, make prompt payment to its Subcontractors or to Construction Manager's employees, or comply with Applicable Laws, or if Construction Manager is otherwise guilty of a material breach of this Agreement or any warranty made herein, then Owner may, by written notice to Construction Manager, notify the Construction Manager of the cause for termination and provide a reasonable period of time in which the Construction Manager shall cure the identified cause for termination. If the Construction Manager fails to completely cure the identified cause for termination within the time set forth by the Owner, then without prejudice to any other right or remedy, the Owner may terminate the employment of Construction Manager, in whole or in part, and take possession of the Project site, the Contract Documents, Subcontracts, Project Documentation in the possession of Construction Manager, and all equipment and materials at the site.

§ 10.5 ERRONEOUS TERMINATION FOR CAUSE

In the event the employment of Construction Manager is terminated by Owner for cause and it is subsequently determined by a court or other tribunal of competent jurisdiction that such termination was without cause, such termination shall thereupon be deemed a Termination for Convenience under Section 14.4 of the General Conditions and the provisions of Section 14.4 of the General Conditions regarding compensation shall apply.

ARTICLE 11 MISCELLANEOUS PROVISIONS

§ 11.1 Terms in this Agreement shall have the same meaning as those in A201-2007.

§ 11.2 Ownership and Use of Documents

Section 1.5 of A201-2007 shall apply to both the Preconstruction and Construction Phases.

§ 11.3 Governing Law

The Contract shall be governed by the law of the State of North Carolina. Venue for any and all claims or causes of action arising out of the Contract or arising out of any action or inaction related to the Contract shall be solely and exclusively in the North Carolina State Court, Superior Court Division in Durham County, North Carolina.

§ 11.4 Assignment

Owner and Construction Manager respectively bind themselves, their partners, successors, assigns and legal representatives to this Agreement. Except as provided in Section 15.2.2 of the General Conditions, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

§ 11.5 Other provisions:

« »

ARTICLE 12 SCOPE OF THE AGREEMENT

§ 12.1 This Agreement represents the entire and integrated agreement between the Owner and the Construction Manager and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both Owner and Construction Manager.

§ 12.2 The following documents comprise the Agreement:

- .1 AIA Document A133–2009, Standard Form of Agreement Between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price
- .2 AIA Document A201–2007, General Conditions of the Contract for Construction
- .3 AIA Document E201™–2007, Digital Data Protocol Exhibit, if completed, or the following:

«N/A»
- .4 AIA Document E202™–2008, Building Information Modeling Protocol Exhibit, if completed, or the following:

«N/A»
- .5 Other documents:
(List other documents, if any, forming part of the Agreement.)

« »

ARTICLE 13 EQUAL BUSINESS OPPORTUNITIES PLAN

§ 13.1 General requirements.

- .1 The Construction Manager and the Director of the City's Department of Equal Opportunity/Equity Assurance (EO/EA) shall develop a Small Disadvantaged Business Enterprise ("SDBE") Strategic Plan to maximize contracting opportunities for goods and services for small disadvantaged businesses certified by the City (SDBEs). The Construction Manager shall comply with all applicable provisions of Article III of Chapter 18 of the Durham City Code (Equal Business Opportunity Program), as amended from time to time.
- .2 The project goals for SDBE participation, including lower tier subcontractors and vendors shall be determined by the Owner and set forth in an approved SDBE Strategic Plan.
- .3 In all solicitations for which the established goal(s) are applicable, the Construction Manager will not enter into contracts for goods or services without first soliciting bids from SDBEs and requiring bidders to submit a Participation Plan to meet the goal(s). Bidders must state their SDBE participation in a manner like that required by bidders on contracts to be awarded by the City. If a bidder fails to achieve the goal(s), the bidder must submit documentation to the Construction Manager of its good faith efforts to achieve the goal(s) within two working days after bid opening. The Construction Manager shall take all reasonable actions needed to see that bidders comply with this subsection (iii). The Construction Manager shall make bids and documentation of good faith efforts available to the Director.
- .4 The Construction Manager will solicit SDBE interest in upcoming contracting opportunities to ascertain the availability of SDBEs that might be capable of servicing the bid opportunities. Each such notice shall be given in a manner and schedule so that the SDBEs will have a reasonable amount of time to respond as outlined in the SDBE Strategic Plan.
- .5 The Construction Manager will provide quarterly reports on all contracting activity to the Director for reporting to the City Council. The reports are due the 15th day of April (for January – March), July (for April – June), October (for July – September) and January (for October – December).
- .6 The Construction Manager shall comply with all applicable provisions of Article III of Chapter 18. The failure of the Construction Manager to comply Article III of Chapter 18 shall be a material breach of contract which may result in the rescission or termination of this contract and/or other appropriate remedies in accordance with the provisions of that chapter, this contract, and State law. The Participation Plan submitted by the Construction Manager in accordance Article III of Chapter 18 is binding on the Construction Manager.

- .7 Section 18-59(f) of Article III of Chapter 18 provides, in part, “If the City Manager determines that the Construction Manager has failed to comply with the provisions of the Contract, the City Manager shall notify the Construction Manager in writing of the deficiencies. The Construction Manager shall have 14 days, or such time as specified in the Contract, to cure the deficiencies or establish that there are no deficiencies.” It is stipulated and agreed that those two quoted sentences apply only to the Construction Manager’s alleged violations of its obligations under Article III of Chapter 18 and not to the Construction Manager’s alleged violations of other obligations.

§ 13.2 Remedies. The parties recognize that the City considers the obligations of the Construction Manager under subparagraphs 13.1.1 through 13.1.7 to: (1) further an important policy of the City for the benefit of the public; (2) be material to this entire agreement, and (3) be part of the reason that the City is willing to enter into this agreement. The parties recognize that the City will suffer financial loss if the Construction Manager does not comply with its obligations under Paragraph 13.1. The parties recognize that the City could terminate this agreement if the Construction Manager breaches its obligations under Paragraph 13.1, and that such a termination would result in monetary losses to the City. The parties also recognize the delays, expense, and difficulty to both parties involved in proving or contesting the amounts of those losses. Instead of requiring proof of those amounts, it is agreed that Construction Manager shall be liable for and shall pay the City the amount specified herein as liquidated damages, and not as a penalty. The amounts stated as liquidated damages are agreed to be reasonable estimates of the City's losses and expenses for delays, including administrative costs. The City may collect liquidated damages by retaining moneys otherwise due Construction Manager in the amount of such damages, and by other legal means. Nothing in this Section 13.2 shall reduce the City's rights under other provisions of this agreement, any applicable statutes or ordinances, or any applicable principle of law. In its discretion, the City may waive some or all liquidated damages against the Construction Manager. Such a waiver is valid only if done by a signed writing that refers specifically to this Section 13.2 and specifically mentions “liquidated damages.” If the City seeks an injunction to require compliance with any portion of Section 13.1, the Construction Manager hereby agrees to waive any contention that the injury from the noncompliance would not be irreparable or that the City has an adequate remedy at law.

§ 13.3 The damages shall be as follows:

- .1 For the Construction Manager’s failure to comply with subparagraph 13.1.3: One percent of the amount of the payments made by the Construction Manager under each contract entered into in violation of subparagraph 13.1.3, unless the goals were met or good faith efforts were made with respect to that the contract.
- .2 For failure to make bids and documentation of good faith efforts available to the Director as required by subparagraph 13.1.3: \$250 for the first occurrence of noncompliance; \$500 for the second occurrence; and \$1,000 for each subsequent occurrence.
- .3 For noncompliance with subparagraph 13.1.4: One percent of the amount of the payments made by the Construction Manager under each contract entered into in violation of subsection 13.1.4, unless the goals were met or good faith efforts were made with respect to that the contract.
- .4 For noncompliance with subparagraph 13.1.5: \$250 for the first occurrence of noncompliance; \$500 for the second occurrence of noncompliance; and \$1,000 for each subsequent occurrence.

§ 13.4 Definitions. In this document, words, including “SDBE” and the “Director” shall have the meaning assigned in Article III of Chapter 18 of the Durham City Code (Equal Business Opportunity Program), unless the context requires otherwise.

ARTICLE 14 ECONOMIC AND EMPLOYMENT DEVELOPMENT PLAN

§ 14.1 The Economic and Employment Development Plan established by Construction Manager, if applicable, is incorporated and made a part of this Agreement by reference.

§ 14.2 The Construction Manager shall provide to the Director of the Office of Economic and Workforce Development for the City of Durham a report on the first day of each calendar quarter demonstrating its compliance with the Economic and Employment Development Plan (hereafter the “Workforce Development Plan”.) If the Construction Manager fails to comply with this requirement the Owner will be damaged in amounts that will be difficult and expensive to determine. The Construction Manager and Owner therefore agree that as a reasonable estimate of the damages the Construction Manager shall pay liquidated damages to the Owner in the following

amounts.

- .1 \$250 for the first occurrence of non-compliance;
- .2 \$500 for the second occurrence of non-compliance;
- .3 \$1,000 for each subsequent occurrence of non-compliance.

§ 14.3 Failure to comply with the Workforce Development Plan constitutes a breach of this Agreement. The Director of the Office of Economic and Workforce Development shall determine whether the Construction Manager is in compliance with the Workforce Development Plan.

[SIGNATURES APPEAR ON THE FOLLOWING PAGES]



This Agreement is entered into as of the day and year first written above.

OWNER

CITY OF DURHAM

ATTEST:

By: _____

Preaudit Certification:

OWNER'S DESIGNATED REPRESENTATIVE

THE DURHAM BULLS BASEBALL CLUB, INC.

ATTEST:

By: _____

_____ Secretary

_____ President

(SEAL)

State of _____

THE DURHAM BULLS BASEBALL CLUB, INC.

County of _____

I, a notary public in and for the aforesaid county and state, certify that _____ personally appeared before me this day and stated that he or she is _____ Secretary of THE DURHAM BULLS BASEBALL CLUB, INC., a corporation, and that by authority duly given and as the act of the corporation, the foregoing contract or agreement with the City of Durham was signed in its name by its _____ President, whose name is _____, sealed with its corporate seal, and attested by him/herself as its said Secretary or Assistant Secretary. This the _____ day of _____, 20 _____.

My commission expires:

Notary Public

CONSTRUCTION MANAGER

LEND LEASE (US) CONSTRUCTION INC.

ATTEST:

Secretary
(SEAL)

By: _____

President

State of _____

LEND LEASE (US) CONSTRUCTION INC.

County of _____

I, a notary public in and for the aforesaid county and state, certify that _____ personally appeared before me this day and stated that he or she is _____ Secretary of LEND LEASE (US) CONSTRUCTION INC., a corporation, and that by authority duly given and as the act of the corporation, the foregoing contract or agreement with the City of Durham and THE DURHAM BULLS BASEBALL CLUB, INC. was signed in its name by its _____ President, whose name is _____, sealed with its corporate seal, and attested by him/herself as its said Secretary or Assistant Secretary. This the _____ day of _____, 20_____.

My commission expires:

Notary Public